In the Supreme Court of the United States

October Term 1974

No. 74-1285

PAUL MULLER,

Petitioner,

—vs—

UNITED STATES STEEL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MORGAN, SCALLEY,
LUNT & KESLER

STEPHEN G. MORGAN

345 South State Street, Suite 200
Salt Lake City, Utah 84111

Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Paul Muller, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit herein.

OPINION BELOW

The opinion of the court below entered upon January 14, 1975, and adhered to upon rehearing, is printed in unofficial text in an appendix to this Petition for the convenience of this Court.

JURISDICTION

Jurisdiction is invoked under Section 1254(1) of Title 28 of the United States Code.

The opinion of the United States Court of Appeals for the Tenth Circuit was filed, as stated, upon January 14, 1975, Petition for Rehearing was duly filed upon January 27, 1975; and an order denying the Petition for Rehearing was entered upon February 5, 1975. The time for filing this Petition expires on April 14, 1975.

QUESTIONS PRESENTED

1. Whether a person found by both the trial court and the appellate court to have been a victim of "an unlawful employment practice", i.e., a discriminatory promotion system, under Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e-2(a)(2), must also prove that he was "constructively discharged" in order for the trial court to award back pay under Section 706(g) of the same Act for any period of time after the date on which he terminates his employment with the guilty employer.

2. Whether the award of an attorneys' fee under Section 706(k) of the same Act by the trial court, the excessiveness of which was not put in issue on appeal, may be reduced by reason of the fact that the compensatory damages granted to the victim of discrimination will necessarily be substantially lessened as a result of the appellate court's ruling on the issue of damages.

FEDERAL STATUTES INVOLVED

1. Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e-2(a) provides as follows:

> "It shall be an unlawful employment practice for an employer —
>
> . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

2. Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U. S. C., §2000e-5(g):

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or ex-

pelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS §2000e-3(a)]."

3. Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U. S. C., §2000e-5(k):

"In any action or proceeding under this title[42 USCS §§2000e-2000e-17] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

STATEMENT OF THE CASE

Petitioner, Paul Muller, a member of the Spanish-American race, brought an individual action pursuant to Title VII of the Civil Rights Act of 1964 alleging that Respondent, United States Steel Corporation, engaged in an unlawful promotion practice which operated to discriminate against Petitioner because of his race and which resulted in his constructive discharge from the employ of U. S. Steel. Specifically, Petitioner claimed that he was unlawfully excluded from the position of spell foreman, a temporary supervisory position, which must be held before a worker can advance to the permanent position of turn foreman, the lowest management job level. Petitioner further alleged that U. S. Steel's promotional procedures were inherently discriminatory in violation of Title VII

U. S. Steel denied that its promotional procedures operated to discriminate against Petitioner, denied that Petitioner was discriminated against, and denied that he was constructively discharged.

The matter came on for trial before the Honorable Willis W. Ritter, Chief Judge, without a jury. Judgment was entered against U. S. Steel in the amount of $26,624.35 for back pay, interest and retirement benefits less interim earnings, together with the sum of $14,000 for attorneys' fees and $18.00 for costs. The Court further ordered U. S. Steel by injunction to change its unlawful promotion system and ordered it not to discriminate against Spanish-Americans presently employed by it.

The Respondent, United States Steel Corporation, appealed to the United States Court of Appeals, Tenth Circuit, seeking reversal of the lower court's judgment with respect to the alleged unlawful employment practice and the back pay award. The Tenth Circuit agreed with the district court that Respondent was guilty of an unlawful employment practice with regard to Petitioner but held that since Petitioner was not "constructively discharged" [see Appendix p. xiv], that he was not entitled to back pay, retirement and interest from the date of leaving the Respondent's employ. The appellate court further held that the award of attorneys' fees was excessive in view of the action taken by that court with respect to the damages' issue.

The Petitioner, Paul Mulier, seeks a reversal of the Tenth Circuit holding that since he was not "constructively discharged" he would not be entitled to monetary damages in the form of back pay, interest, and retirement from the date of leaving Respondent's employ. Petitioner also assigns

as error the holding by the court below that the attorneys' fee was excessive in view of the action taken therein.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED TO PREVENT EMASCULATION OF THE INTENT OF CONGRESS AND PRIOR RULINGS OF THIS COURT AND THE MAKING OF A SHAM OUT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 IN THAT IF THE DECISION BELOW IS ALLOWED TO STAND THEN DISCRIMINATING EMPLOYERS NEED NOT COMPENSATE THE VICTIMS OF THEIR UNLAWFUL CONDUCT UNLESS SUCH VICTIMS HAVE BEEN "CONSTRUCTIVELY DISCHARGED" AND FURTHER BECAUSE SUCH DECISION CONFLICTS WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 42 U. S. C. 2000e-2(a) AND 2000e-5(g).

Section 703(a) of Title VII of the Civil Rights Act of 1964 [hereafter "the Act"], 42 U. S. C. §2000e-2(a) states in pertinent part that:

> "It shall be an unlawful employment practice for an employer —
>
> ... (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any indivdual of employment opportunities or otherwise adversely affect his status as an em-

> ployee, because of such individual's race, color, religion, sex, or national origin."

Section 706(g) of Title VII of the Act states in pertinent part:

> "(g) If the court finds that respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent fro mengaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer) ... responsible for the unlawful employment practice ..."

The district court in the principal case adjudged that Respondent, United States Steel Corporation, was guilty of an unlawful employment practice under Section 703(a) of Title VII of the Act. It then determined, in its discretion, to award back pay to the Petitioner as part of the relief that a court may grant under Section 706(g) of Title VII of the Act. On appeal, the U. S. Court of Appeals, Tenth Circuit, affirmed the holding of the lower court that an unlawful employment practice had been committed [see Appendix, p. xiii], but maintained that since Petitioner was not "constructively discharged" that he would not be entitled to damages in the form of back pay, interest, and retirement from the date of leaving the Respondent's employ [see Appendix, p. xiv]. The latter holding was clearly an error on the appellate court's part.

Section 703(a) sets forth two subdivisions which include the types of conduct which shall be considered "unlawful

employment practices" under the Act. Subdivision (1) indicates that

> "to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, . . . or national origin."

are unlawful employment practices. Subdivision (2), supra, [p. 6], likewise attempts to outline in broad terms the type of conduct which shall be held to constitute an unlawful employment practice under the Act.

"Discharge" is specifically mentioned under subdivision (1) of Section 703(a) and for valid reason. Racial discrimination has and may often be practiced in this manner. Discrimination often manifests itself, however, in less dramatic but equally damaging forms, not the most infrequent of which is a denial of promotional opportunities which is made a violation under subdivision (2) of Section 703(a). Without question, racial discrimination with regard to advancement is as much an unlawful employment practice as is unlawful discharge or refusal to hire. *Marquez* v. *Omaha District Sales Office, Ford Division of Ford Motor Company*, 440 F. 2d 1157 (8th Cir. 1971); *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 377 (4th Cir.), *cert. denied*, 409 U. S. 982 (1972); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir.), *cert. denied*, 401 U. S. 954 (1970); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F. 2d 437 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (8th Cir. 1973).

It cannot then be rationally asserted that the discretionary power granted to the federal trial courts under Section 706(g) limits the court to granting appropriate remedies only in those rare instances of overt and direct acts of discrimination, i.e., discharge or refusal to hire. If an employer is found to have committed *any* unlawful employment practice covered by the Act, whether under subdivision (1) or subdivision (2) of Section 703(a), then the trial court may ". . . order such affirmative action as may be appropriate . . ." [§2000e-5(g), 42 U. S. C.]

By requiring Petitioner to show constructive discharge as a prerequisite to recovery, the Tenth Circuit has unduly restricted the scope of Title VII and has in this case achieved a result totally out of consonance with the objective and purpose of the Act. No other U. S. Court of Appeals has, since the enactment of Title VII, attempted to construe that statute as narrowly and inappropriately as the court below has in this instance. What that court is saying, in effect, is that certain unlawful employment practices covered by the Act will not be tolerated but that certain other unlawful employment practices covered by the Act are not of such a nature as to warrant recovery, even though actionable under the law. Such a result does not comport with the express language of Sections 703(a) and 706(g) of Title VII of the Act nor is it consistent with the intent of Congress underlying the passage of the Act. The United States Supreme Court observed in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 249-430 (1971):

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment op-

> portunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Cf. Louisiana* v. *United States*, 380 U. S. 145, 154 (1965).

Petitioner proved that Respondent was guilty of an "unlawful employment practice", i.e., a discriminatory promotional system, under subdivision (2) of Section 703(a) of the Act. The Tenth Circuit upheld the finding of the district court as to such "unlawful employment practice". The district court, therefore, according to Section 706(g) of Title VII of the Act, should then have the power to grant whatever relief it deems necessary to make the victim whole, including an award of back pay. The appellate court cannot, arguably, impose upon the victim of discrimination novel and more stringent requirements beyond that which is required by the Act, which are unsupported by statutory or case authority, such as requiring the Petitioner to prove, in addition to the "unlawful employment practice", i.e., "the discriminatory promotional system", that he was "constructively discharged". While "constructive discharge" may relate to a violation under subdivision (1) of Section 703(a) of the Act, it certainly does not relate to a violation under subdivision (2) of Section 703(a) of the Act.

In *Pettway* v. *American Cast Iron Pipe Company*, 494 F. 2d 211, 252 (5th Cir. 1974), the Fifth Circuit recently stated that under Title VII "the scope of a court's discretion to deny back pay is narrow." [See *U. S.* v. *Georgia Power Co.*, 474 F. 2d 906 (5th Cir. 1973); *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Company*, 486 F. 2d 870 (6th

Cir. 1973); *Bowe* v. *Colgate, Palmolive Company*, 489 F. 2d 896 (7th Cir. 1973).]

Petitioner's position in this matter is strongly supported by recent decisions in other U. S. Circuit Courts of Appeal. In *Bowe*, supra, the Seventh Circuit at least impliedly recognized that employees who have resigned under a discriminatory promotional system have suffered no less a compensable injury under the Act. The case had previously been remanded to the trial court for consideration of the back pay award [416 F. 2d 711 (7th Cir. 1969)] and subsequently appealed again on the ground, among others, that the back pay awards did not reasonably represent the difference between the amount earned by the discriminatees and the amount they would have earned had no discrimination been pratciced. In connection with this issue, the Court of Appeals noted:

> "There were other deficiencies in the procedure for making the awards. Some members of the class who had worked for substantial periods after the effective date of Title VII, and thus been exposed to the discriminatory elements of the system, had resigned or retired before the test period. No differential allowance was made to them on the basis of comparability to others who did have experience in the test period, or on the basis of the average of those who had such experience, or otherwise. Leaving them out implies a presumption that they suffered no loss as a result of discrimination, and we think that to the extent any presumption is to be applied, it must be the opposite." At 903.

Similarly, the case of *Head* v. *Timken Roller Bearing Company*, supra [(6th Cir. 1973, on remand, 7 EPD ¶9420

(S. D. Ohio 1974] buttresses this proposition. On remand, the district court said:

> "(T)he class of employees who are entitled to be made whole are all persons who beginning on July 2, 1965, were assigned to the 'black departments' by reason of their race and who remained there for any period of time ending November 4, 1968 . . . This class will be subdivided into five subclasses: . . . (b) Those black employees who were hired after July 2, 1965, *or quit prior to November* 4, 1968; . . ." (Emphasis supplied.)

In *Watkins* v. *Washington*, [472 F. 2d 1373 (D. C. Cir. 1972)], Judge Skelly Wright held:

> "The record also supports the District Court's conclusion that all of the 14 named *past and present* employees of the Housing Division were harmed by the discriminatory promotional policies. The court acted well within its powers in deciding to compensate these individuals for the harm suffered through a back pay award, and the court's method of calculating back pay seems reasonable in light of the consistent and widespread discrimination evidenced in this record . . ." (Emphasis supplied.)

The language in *Bowe*, *Head* and *Watkins*, supra, leaves no doubt that the primary consideration in the making of the back pay award is to ensure that all the victims of the discriminatory system are made whole, including those who had resigned or retired while such a system was in effect.

Such a result is in consonance with the above-quoted language of the statute itself which, once an unlawful employment practice has been found to exist, vests in the district court the discretionary power to fashion the appropriate relief. Absent a clear and convincing showing that there was an abuse of discretion, the province of the trial judge regarding the matter of damages should not be invaded. *Brotherhood of R. Trainmen* v. *Baltimore & O. R. Co.*, 311 U. S. 519. Where, as here, the appellate court sets aside the damage award based upon an erroneous interpretation of the law, an even stronger argument exists for reinstating the original order. The Tenth Circuit did not determine that there was an abuse of discretion because there was no compensable injury to the employee; they merely determined that because he was not "constructively discharged" that he was not entitled to back pay after the date that he resigned. The Sixth, Seventh and D. C. Circuits are quite plainly in disagreement with such an approach, and recent decisions in the Fourth and Fifth Circuits, while not having directly confronted the issue presented here, certainly provide ample support for the proposition that the back pay award should be employed to compensate the victim or victims of employment discrimination, whatever form that discrimination might manifest itself. [*Johnson* v. *Goodyear Tire and Rubber Co.*, supra; *Moody* v. *Albemarle Paper Company*, 474 F. 2d 134 (4th Cir. 1973); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971).]

It has been recognized that the award of back pay is proper even though reinstatement is not requested or granted. [*Schaeffer* v. *San Diego Yellow Cab Co.*, 462 F. 2d 1002 (9th Cir. 1972.] It has also been awarded even though some inexactitude is involved in the calculation of the award [*Brennan* v. *City Stores, Inc.*, 479 F. 2d 235, 242 (5th Cir. 1973)] and one court has said that any uncertainty in the determination of a back pay award should be resolved

against the discriminating employer. [*Johnson* v. *Goodyear Tire and Rubber Co.*, supra.]

In discussing the Congressional intent of the relief section of the 1972 Amendments to Title VII, the Senate-House Conference Report states:

> "The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present Section 706(g) the Courts have stressed that the scope of relief under that Section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Section-by-Section Analysis, Congressional Record (H. 1863), March 8, 1972.

The Tenth Circuit, by not simply narrowly construing the material provisions of Title VII involved in Petitioner's complaint but rather misconstruing them to require "constructive discharge" when such requirement is neither expressed nor implied in the pertinent language "deprive or tend to deprive" [42 U. S. C. §2000e-2(a)(2)] contained therein, essentially deprives the Petitioner of any real compensation for the discrimination that that court fully agrees he has suffered. [See Appendix, p. xiii.] Further, the court below has effectively barred future victims of discriminatory employment practices from actively seeking redress by private actions in federal courts in the Tenth Circuit. Unless a plaintiff is fortunate enough to have been discharged or "constructively discharged", a finding that he has been the victim of discriminatory promotional system (or other unlawful employment practice) does him no good whatever. Such a finding does nothing to restore the victim to his rightful place nor does it discourage the wrongdoing employer from committing the unlawful practice. If the discriminating employer need not compensate the victims of his unlawful conduct, is the law really being applied in the manner in which Congress intended? It is submitted that it is not.

Here the Tenth Circuit has overturned the judgment of the district court by reversing a finding that the trial court need not have reached. Whether or not the appellate court had a basis for so doing is not material. What is important is that Petitioner proved each and every element that he needed in order to recover — an unlawful employment practice engaged in intentionally, not accidentally, by the employer, for which no business necessity could be shown. He should not be denied recovery because he failed to carry the burden with regard to elements comprising another recognized unlawful employment practice not pleaded in his complaint. No similar requirement has been imposed by any other U. S. Circuit Court of Appeals and for the reasons outlined in the present argument, it is urged that the requirement should not be imposed here.

II.

THE WRIT SHOULD BE GRANTED TO PREVENT THE AWARD OF ATTORNEYS' FEES

UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 FROM BEING DEPENDENT UPON THE DAMAGE AWARD WHICH WOULD DISCOURAGE VICTIMS OF DISCRIMINATION FROM PRESENTING TITLE VII CONTROVERSIES TO THE COURT RATHER THAN BEING AWARDED AS PART OF COSTS AS THE STATUTE PROVIDES AND THUS ENCOURAGING SUCH VICTIMS TO ACT AS PRIVATE ATTORNEYS GENERAL AND LITIGATE SUCH MATTERS AS CONGRESS INTENDED AND FURTHER BECAUSE THE DECISION BELOW IN THIS REGARD CONFLICTS WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 42 U. S. C. §2000e-50(k).

The court below stated in its opinion [Appendix, p. xvi] that:

> ". . . [T]he attorney's fee is excessive in view of the action which we have taken, . . ."

Section 706(k) of Title VII of the act [42 U. S. C. §2000e-5(k)], provides that:

> "In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the cost of the litigation."

The purpose of this provision is to effectuate the Congressional policy against racial discrimination. [*Clark* v.

American Marine Corp., 320 F. Supp. 709 (E. D. La. 1970), aff'd 437 F. 2d 959 (5th Cir. 1971).] In discussing a similar provision in Title II, the United States Supreme Court observed that:

> "If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney general', indicating a policy that Congress considered of highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress, therefore, enacted the provision for counsel fees — not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief . . ." [*Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401-402 (1968).]

The role of the private litigant in Title VII cases has been categorized by the courts as that of a "private attorney general." [*Bowe*, supra, at 719 (7th Cir. 1969); see also *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 33 (5th Cir. 1968); *Clark* v. *American Marine Corp.*, supra.] Even where the plaintiff does not desire or succeed in obtaining injunctive relief, it has been recognized that a valuable public service has nevertheless been performed. [*Parham* v. *Southwestern Bell Tel. Co.*, 433 F. 2d 421 (8th Cir. 1970).] Similarly, the Fifth Circuit in *Clark* v. *American Marine Corp.*, supra, held that plaintiffs were entitled to an award of attorneys' fees, notwithstanding the fact that they did not

receive back wages, because they skillfully and successfully proved a pattern of covert discrimination in employment.

Title VII was designed to provide that the final sanction would be judicial enforcement initiated by private litigants. [42 U. S. C. §2000e-5(e); *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219, 1222 (9th Cir. 1971); *Williams* v. *General Foods Corp.*, 492 F. 2d 399, 406 (7th Cir. 1974); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 32 (5th Cir. 1968).] As the prevailing party in federal litigation is generally entitled to ordinary costs [Rule 54(d) Federal Rules of Civil Procedure], Congress, in enacting Section 706(k), apparently intended that the rule would encourage the presentation to the court of controversies involving Title VII. Where a party prevails, therefore, the trial court may, in its discretion, make such award, as is supported by the evidence and which it deems appropriate. [*Schaeffer*, supra.]

The Petitioner was a successful litigant, insofar as his theory of action was concerned. The trial court found that Petitioner had proved a pattern and practice of covert discrimination and a judgment, including an injunction against the Respondent, U. S. Steel Corporation, was entered in his favor on February 15, 1974. True, a consent decree entered in another court [*United States* v. *Allegheny-Ludlum Industries, Inc.*, Civil Action No. 74-399, U. S. District Court, Northern District of Alabama (April 12, 1974)] rendered the granting of the earlier injunction by the trial court perhaps unnecessary, but such a proceeding was clearly collateral to Petitioner's action and his counsel expended no less time and effort reiterating his position in the trial court proceeding that took place two months before the entry of the consent decree.

In *United States* v. *Allegheny-Ludlum Industries, Inc.*, 63 F. R. D. 1 (N. D. Ala. 1974), a proceeding on application for intervention, the court, with reference to the consent decree in question, said:

> ". . . these decrees, . . . it should be emphasized are not binding on individual employees . . . The court does recognize that these decrees may, as a practical matter, impede, if not impair, some interests of private litigants . . . [I]t must be kept in mind that resolution in this forum of issues between the government and the defendants *does not preclude additional -- or even inconsistent — relief in favor of private parties in other litigation.*" At 5-6 (Emphasis supplied.) [See also *United States* v. *Local Union No. 3, International Union of Operating Engineers*, 6 EPD ¶8946 (N. D. Cal. 1973.]

The Respondent contended both in the trial court and the appellate court that it was not guilty of an unlawful employment practice. Petitioner prevailed on that issue and it is here contended that he is entitled to a reasonable attorneys' fee, not dependent upon the damage award, but as a part of costs as the statute suggests. Suggested guidelines for the computation of the award are set forth in the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106. [A recent Fifth Circuit decision which adopted standards consistent with the ABA guidelines is *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir., 1974).]

The reasonableness of the award is to be judged by the abuse of discretion standard of review, [*Weeks* v. *Southern Bell Tel. & Tel. Co.*, 467 F. 2d 95 (5th Cir., 1972)] and

". . . the amount of the award should not be such that it would discourage others from seeking to attack discriminatory practices." [*Schaeffer*, supra.]

The criteria observed by the trial court in this instance are consistent with the broad remedial policy behind the Act and with the specific factors recognized by the American Bar Association [p. 19 supra]. The Petitioner prevailed on all issues at trial and successfully defended his position as to a discriminatory practice on appeal. The holding of the court below that the attorneys' fees were excessive because of reduction of the back pay award is plainly inconsistent with the language of the statute, with the intent of Congress in enacting the provision, with the decisions in other federal courts of appeal, and with decisions of the United States Supreme Court.

CONCLUSION

For the foregoing reasons, Paul Muller, your Petitioner, respectfully prays that his Petition for Certiorari be granted.

Respectfully submitted,

MORGAN, SCALLEY,
LUNT & KESLER
STEPHEN G. MORGAN
345 South State Street, Suite 200
Salt Lake City, Utah 84111
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 74-1161

PAUL MULLER,
Plaintiff-Appellee,
vs.
UNITED STATES STEEL CORPORATION,
Defendant-Appellant.

Appeal from the Judgment of the United States District Court for the District of Utah, Central Division D.C. No. C 283-72

James B. Lee and Daniel M. Allred of Parsons, Behle & Latimer, Salt Lake City, Utah, for Defendant-Appellant.
Stephen G. Morgan of Morgan, Scalley, Lunt & Kesler of Salt Lake City, Utah, for Plaintiff-Appellee.

Before SETH, BARRETT, and DOYLE, Circuit Judges.
DOYLE, Circuit Judge.

United States Steel seeks reversal of a judgment rendered by the United States District Court for the District of Utah in favor of the plaintiff Muller. The court adjudged that the Steel Company had discriminated against Muller in its promotion policies in violation of Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e-2(a).

The main contention of United States Steel is that the evidence at trial was legally insufficient to establish that

the plaintiff was a victim of discriminatory employment practices toward plaintiff. So, our primary inquiry is whether appellant company discriminated and whether appellee was shown to have been discriminated against. There are other contentions which will be enumerated and discussed.

The plaintiff is of Spanish-American origin. He commenced working for United States Steel in 1955 and continued until August 6, 1969. At present hel ives and works in Albuquerque, New Mexico. He has not sought reinstatement.

Plaintiff was employed at the Geneva Plant of United States States Steel near Orem, Utah. His employment was in the large diameter pipe mill. It was the admitted failure of the company to promote plaintiff to a supervisory position which led to the filing of this case.

The lowest supervisory position in the mill is the turn foreman. If such a foreman is replaced by a production employee on a temporary basis, he is given the position of spell foreman but is still paid by the hour. Generally speaking, in order for a production employee to become a turn foreman he must have previously served as a spell foreman. The spell foreman is selected from the shift in which a vacancy occurs in a particular area of the mill. There are three such areas in the diameter mill — the O. D. or hot line area, the I. D. area and the finishing area. Muller's main qualifications, according to his testimony, were in the O. D. or hot line area.

The selection of a spell foreman is made by the general foreman, whose decisions are for practical purposes final,

although not necessarily so, for there exist no definite recognized criteria which govern the selection of a spell foreman. The general foreman consults the area foremen who review the names on the crew schedule. The general foreman in making the selection considered the recommendation of the area foreman, the ability of the individual to perform his work, his ability to get along with people, leadership ability, promptness, attitude toward the work and, finally, experience. Such jobs are not published and thus the qualifications are not set forth in writing. Complaint is made that the vagueness of the criteria lends itself to discriminatory practices.

The population of the county from which the company draws its labor force was 137,776 in 1970 of which 2,596, or about 1.88%, were, according to the Census Bureau, Spanish language or origin persons. However, the percentage of persons of Spanish origin who are employed in the whole facility is far lower than the county-wide percentage. This is apparent from the columnar analysis which is shown below.[1]

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[1].

Date	Geneva Works Total	Geneva Works Spanish-American	Pipe Mill Total	Pipe Mill S/A
1964	5,087	9 (.18%)	340	3 (.88%)
1964	4,856	11 (.23%)	282	3 (1.06%)
1965	3,774	9 (.24%)	331	3 (.90%)
1966	4,617	10 (.22%)	113	4 (3.64%)
1967	5,061	10 (.20%)	420	4 (.95%)
1968	4,751	23 (.49%)	446	9 (2.02%)
1969	4,274	17 (.40%)	91	6 (6.6%)
1970	4,472	(Not reported)	210	4 (1.9%)
1971	4,488	24 (.55%)	115	2 (1.74%)
1972	4,395	26 (.60%)	142	5 (3.5%)
1973	4,333	21 (.72%)	276	2 (.72%)

From these figures it is also possible to infer for the purposes of the pipe mill, at least, that the Spanish origin people are not to any marked decree underemployed. It is somewhat different, however, when promotions are considered. Mr. Muller, for example, though employed in the pipe mill for fourteen years, was never chosen as a spell foreman and no other Spanish-American person had been chosen since at least 1963. Muller has testified that he was in some cases assigned to the I. D. area instead of the O. D. area or hot line area and that militated against his being eligible for spell foreman in the hot line area. In any event, during 1968 and 1969 the evidence showed that about 20-25 employees were selected as spell foremen, and in every instance these were persons of Anglo origin. Fifteen of this number had more seniority than Muller. There were 20 other employees who had more seniority than Muller who, like Muller, were never selected as spell foremen.

The evidence further showed that Muller had five years of welding experience prior to going to work for the defendant. He completed his high school education and a course in welding during his employ. He also was shown to have undertaken leadership responsibilities in the community.

The instant charges were filed with the Utah Anti-Discrimination Department on December 29, 1968 and January 28, 1969. No action was taken. In July, 1969 the large diameter mill shut down and Muller worked as a laborer. Just prior to the shutdown he worked as an arc welder. On August 6, 1969, he terminated his employment and moved to Albuquerque. His testimony was that the cause of this was the unfair and discriminatory treatment he received at the plant.

Trial was had starting February 8, 1974. The district court found that the promotional system violated Title VII in that it lent itself to discrimination and was not shown to have been the product of business necessity. The court went further. It found that Muller in addition had been constructively discharged from his job in that Muller's resignation was not a matter of free choice; that it resulted from discrimination. An award of $26,624.35 in back pay was made plus $14,000 in attorney's fees. Injunctive relief was also granted, notwithstanding that this was not a class action. Defendant was ordered to take affirmative steps to adopt a non-discriminatory promotional system together with meaningful standards.

The Steel Company's main contentions are, *first*, that the court erred in granting judgment for the plaintiff because of the absence of a finding that plaintiff himself was discriminated against. *Secondly*, the court's judgment is based on, so its is argued, the theory that opportunity to discriminate constitutes a violation of Title VII. *Third*, it is contended that the evidence is insufficient to establish discrimination against the plaintiff. Complaint is also made about the holding that there was a constructive discharge, and at last it is argued that the damages are excessive and that the court erred in issuing general injunctive relief since it was not a class action. Most but not all of the points urged will be reviewed.

I.

WHETHER THE EVIDENCE ESTABLISHED THAT PLAINTIFF WAS DISCRIMINATED

AGAINST ON THE BASIS OF HIS ETHNIC ORIGIN.

Plaintiff's-appellee's complaint is that the failure to appoint him a spell foreman constiuted a violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2.[2] The Steel Company maintains that the statistics are inconsequential pointing out that the number of Spanish origin persons in the community is small and that it employs a representative percentage. However, the cases hold that this is not sufficient to disprove discrimination; that deprivation of employment opportunities can also exist as a result of failure to promote.[3]

The use of statistics capable of raising inferences of employment discrimination is now a well recognized aid in proof in cases of this type. One of the early definitive

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2. That section provides:
It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his staus as an employee, because of such individual's race, color, religion, sex, or national origin.

3. Baxter v. Savannah Sugar Refining corp., 495 F. 2d 437 (5th Cir. 1974); United States v. N. L. Industries, Inc., 479 F. 2d 354 (8th Cir. 1973); United States v. St. Louis-San Francisco Ry. Co., 464 F. 2d 301 (8th Cir.), *cert. denied,* 409 U. S. 1107, 116 (1972); Brown v. Gaston County Dyeing Machine Co., 457 F. 2d 377 (4th Cir.), *cert denied,* 409 U. S. 982 (192); Rowe v. General Motors Corp., 457 F. 2d 348 (5th Cir. 1972); Marquez v. Omaha Dist. Sales Office, Ford Div. of Ford Motor Co., 440 F. 2d 1157 (8th Cir. 191); Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (10th Cir.), *cert. denied,* 401 U. S. 954 (1970).

decisions in this field is that of our court in Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (10th Cir.), *cert. denied,* 401 U. S. 954 (1970) applied in Spurlock v. United Airlines, 475 F. 2d 216 (10th Cir. 1972). There the employer had two categories of truck drivers. These were line or over the road and, secondly, city drivers. The line driver positions were superior in that they paid higher wages and had other benefits as well. The two categories were treated in separate union contracts and there was a no transfer policy from city driver to line driver. The plaintiffs in *Jones* were black persons and city drivers who had sought and been denied transfer. The allegation of the complaint was that the application of the rule, although on its face it appeared as a neutral non-transfer policy, in practice discriminated against them. The decision was that the evidence sufficiently established that the effect of the policy was discrimination since no Negro had been appointed as a line driver between 1964 and 1968. All black drivers were city drivers and, although there were some white drivers in the city category, the vast majority of the total white drivers were in the line category.[4]

In reversing the judgment of the district court the

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4. On this the court said:
The company argues that because the no-transfer policy locks in white as well as Negro city drivers, it is not discriminatory. Roughly 80% of the white drivers were employed as line drivers. The 20% hired as city drivers presumably had the opportunity to apply as line drivers but either were not qualified or preferred city work. In any event, race was not a determinative factor in their employment as city drivers, as it was with the Negroes. Although the no-transfer provisions may have the same ultimate effect on both white and Negro city drivers, the difference in the factors underlying their initial employment as city drivers is sufficient to make the policy discriminatory as to the latter but not the former.

opinion of this court recognized that the existence of a superficially neutral policy did not serve as a sufficient explanation; that it had an inherently discriminatory effect. It was recognized in the court's opinion authored by Judge Breitenstein that the statistics constituted a prima facie case which required that employer to affirmatively show that business necessity required continuation of the policy.[5] The showing of the company was held to be insufficient.

The standards employed in *Jones* were fully recognized in our subsequent decision, Spurlock v. United Airlines, *supra.* In addition, it was there pointed out that specific intent to discriminate was not necessary; that it was sufficient if discriminatory criteria were employed deliberately and not accidentally.

In the case at bar the statistics are less dramatic than were those in *Jones* particularly as to discrimination in the hiring of Spanish-Americans. However, we view methods employed in promotions as sufficient to establish a prima facie case. Also, the *statistics* were sufficient to shift the burden of going forward with the evidence to the employer.

There is an added factor here and that is the existence of vague and inconclusive criteria in promotion decisions. We refer to the selection of the spell foreman being made

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5. The court's further statement was:
The remedial nature of Title VII requires the adoption of the business necessity test. If employers or unions could pursue, upon a showing of mere rationality, neutral policies which have the effect of perpetuating past discrimination, the value of the principles developed in Quarles and subsequent casesc would be eroded. When a policy is demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the safe and efficient operation of the business. *See* Local 189, United Paperworkers v. United States, *supra,* 416 F. 2d at 989.

by the general foreman in his uncontrolled discretion. True, he must have the approval of his superiors but disapproval from this source is rare. The big element in the general foreman's decision is the recommendation given by the front line foreman.

Plaintiff-appellee relies on statistical facts and emphasizes especially that no Spanish-American has ever been promoted to the position of spell foreman or temporary foreman, the essential step to becoming a supervisory employee.

The Company asserts that one person of Spanish- American ancestry is a foreman. But this does not prove a lack of discrimination because this individual was not *promoted* to the position. He was transferred as foreman from the West Coast plant of United States Steel.

Opposed to the lack of evidence of promotion of Spanish origin persons, the record shows that appellant promoted 20-25 persons of Anglo origin to the position of spell foreman during the year 1968-69 alone. It is surprising that not a single Spanish person was assigned to this position during this same period. While these statistics are not overwhelming, they are not to be ignored.

The law is clear that a plaintiff in a job discrimination case need not prove that the employer had a specific intent to discriminate. It is sufficient that the employer's conduct produced discriminatory results. *See* Jones v. Lee Way Motor Freight, *supra. See also* Spurlock v. United Airlines, supra. Where, as here, there are circumstances showing discrimination, a prima facie case exists. At bar there is the added factor — the lack of meaningful standards to

guide the promotion decision, whereby there is some assurance of objectivity. Such personal and subjective criteria encourage and foster discrimination.

And where, as here, the results give a strong indication that discrimination is being practiced, the cases condemn subjective standards which United States Steel had in this case. *See* United States v. N. L. Industries, Inc., 479 F. 2d 354 (8th Cir. 1973); Brito v. Zia Co., 478 F. 2d 1200 (10th Cir. 1973); Brown v. Gaston County Dyeing Machine Co., 457 F. 2d 1377 (4th Cir. 1972); Rowe v. General Motors Corp., 457 F. 2d 348 (5th Cir. 1972); Parham v. Southwestern Bell Tel. Co., 433 F. 2d 421 (4th Cir. 1970); United States v. Sheet Metal Workers, Local 36, 416 F. 2d 123 (8th Cir. 1969).

Rowe v. General Motors Corp., *supra*, is a case which like ours involved vague standards. The standards there applied to the transfer of employees from jobs paying hourly wages to salaried jobs. The Fifth Circuit delineated five aspects of the defendant's transfer methods. These were:

> (i) The Foreman's recommendation is the indispensable single most important factor in the promotion process.
>
> (ii) Foremen are given no written instruction pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations).
>
> (iii) Those standards which were determined to be controlling are vague and subjective.
>
> (iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.
>
> (v) There are no safeguards in the procedure designed to avert discriminatory practices.

Id. at 358-59.

More important, the court held that these factors in addition to the statistical indicia of the presence of discrimination made out a prima facie case. In our case the standards were equally vague and subjective. This plus the fact that no person of Spanish-American origin was, as far as we know, ever promoted are enough in our case also to establish a prima facie case that defendant-appellant unlawfully discriminated against Spanish-Americans and against the plaintiff-appellee.

II.

WHETHER BUSINESS NECESSITY EXISTED.

The remaining liability issue is whether these actions were justified. In the leading case on this defense, Griggs v. Duke Power Co., 401 U. S. 424 (1971), the Supreme Court said that unless an exclusion rule is related to job performance it is prohibited. From this the doctrine of business necessity has developed. Under it the employer may rebut a prima facie case of the employee by showing that the maintenance of safety and efficiency requires the practice which obtains. Thus, in Spurlock v. United Airlines, *supra*, the plaintiff had alleged that he had been discriminated against when he was not given a job as a flight officer. The defendant was able to counter with specific

criteria which had been required of all flight officers such as a college degree, a commercial pilot's license, 500 hours of flight time and age between 21 and 29 years old. The court held that the failure of the applicant to meet these justified his rejection in the interest of safety and efficiency.

Other cases enunciate this business necessity doctrine in a more limited manner. The Second Circuit has held that the doctrine must mean more than transfer and seniority policies serve legitimate management functions. The court went on to say that if the ends of safety and efficiency are served by a reasonably available alternative method having less discriminatory effects, "then the present policies may not be continued." United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2d Cir. 1971). *See also* United States v. St. Louis-San Francisco Ry. Co., 464 F. 2d 301 (8th Cir. 1972); United States v. Jacksonville Terminal Co., 451 F. 2d 418 (5th Cir. 1971); Robinson v. Lorrilard Corp., 444 F. 2d 791 (4th Cir.), *cert. denied*, 404 U. S. 1006 (1971).

United States Steel has not shown business necessity or any other justification for its failure to promote plaintiff and other Chicano people to the position of spell foreman. It has not been shown that efficiency or safety or any other of the company's interests are served by this system which depends on hunch judgments rather than specific criteria. Judged by any of the mentioned standards, then, the prima facie case of Muller has not been rebutted.

The Company also argues that, even assuming the existence of discrimination, Muller failed to prove that he was personally discriminated against. It is said that the people who were appointed were all more competent than

Muller. Here again there is no basis for so concluding where there is a palpable lack of objective standards. The trial court found that Muller was not considered for the position, notwithstanding his long seniority and despite the fact that he had clearly held the highest ranking position below the spell foreman and had requested consideration. It cannot be said in view of the results and the lack of criteria that the trial judge's ultimate holding that Muller had been discriminated against was clearly erroneous.

III.

WAS THERE A CONSTRUCTIVE DISCHARGE OF PLAINTIFF?

In our opinion the ruling that constructive discharge took place was error. This doctrine exists when an employer deliberately renders the empliyee's working conditions intolerable and thus forces him to quit his job. *See* J. P. Stevens & Co., Inc. v. NLRB, 461 F. 2d 490 (4th Cir. 1972). Plaintiff would have us rule that the Steel Company's refusal to consider him as spell foreman and its assignment of him to an area which made it impossible for him to become spell foreman created intolerable conditions which satisfied the requirement of constructive discharge. We are persuaded, however, that his reassignment and the other actions complained of were not designed to coerce his resignation. True, just prior to his resignation he was downgraded to laborer, but this was a result of the large diameter mill closing temporarily.

We are not saying that this constructive discharge doctrine which developed in labor cases is inapplicable to civil

rights cases. Cf. Colorado Civil Rights Com'n v. State, 30 Colo. App. 10, 488 P. 2d 83 (1971). In the *Stevens* case, supra, there was evidence that an employee who had favored the union during an organizing effort was harassed by management and the court had no difficulty finding a constructive discharge. This has been found in other cases. *See* for example NLRB v. Century Broadcasting Corp., 419 F. 2d 771 (8th Cir. 1969) and NLRB v. Tennessee Packers, Inc., Frosty Morn Div., 339 F. 2d 203 (6th Cir. 1964). In each of these cases there was extrinsic evidence to establish that an effort had been made to render the job so unattractive and unpleasant so as to justify the finding that the resignation was a constructive firing.

An example of a case in which the evidence was inadequate was Steel Industries, Inc. v. NLRB, 325 F. 2d 173 (7th Cir. 1963), wherein it was said that the evidence did not even establish a strong suspicion as to the existence of a scheme to get rid of the employee in question.

Similarly, in the present case, there is a dearth of evidence to show a deliberate effort to make things difficult for the employee so as to bring about his separation. Hence, the proof of constructive discharge fails.

IV.

EFFECT OF THE FAILURE OF THE CONTENTION OF CONSTRUCTIVE DISCHARGE ON THE DAMAGE AWARD.

Unless appellant was constructively discharged, he would not be entitled to damages in the form of back pay, interest and retirement from the date of leaving the Steel

Company's employ. His damage would be measured by the difference between actual pay and the amount he would have made if he had been chosen as spell foreman during the period from September 17, 1967 until he quit, August 6, 1969. There is no evidence in the record which could be used for this purpose. *Hence, this will necessitate remand.* The Steel Company says that the damages were excessive even if there was a constructive discharge. The court applied the formula testified to by an expert witness, Mr. Caldwell. Defendant's evidence consisted of the pay record of an employee who was only slightly senior to Muller. It claimed that since Muller had less seniority he could not have earned more than this other employee. This is one point which we need not consider.

The Steel Company makes the added contention that Muller's award cannot be based on the 1968-69 base period because if he had not quit he would have worked in lower paying jobs and would have been laid off more often. We do not believe, however, that these figures for the period in question were erroneously adopted by the court in the face of the inconsequential evidence offered by the company.

In our view, the granting of general injunctive relief applicable to the entire class was *not appropriate because the plaintiff had not sought prospective injunctive relief for himself.* Therefore, no basis existed for such relief as to the other persons who had not asserted claims of this nature. In any event, a consent decree has been entered in a suit brought by the United States and, therefore, virtually the same relief was given. We see no occasion for an injunction or ancillary remedy in this case.

It is our conclusion, then, that the judgment of the district court should be affirmed in part and reversed in part and that the action should be remanded for further proceedings consistent with the views expressed herein. *It is our further conclusion that the attorney's fee is excessive in view of the action which we have taken, and it is ordered that this part of the judgment be also vacated and reconsidered in the light of the results achieved.* It is so ordered.

JANUARY TERM — FEBRUARY 5, 1975

Before The Honorable Oliver Seth, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges.

PAUL MULLER,
Plaintiff-Appellee,

vs.

UNITED STATES STEEL CORPORATION,
Defendant-Appellant.

No. 74-1161

This matter comes on for consideration of the petition for rehearing filed by the appellee in the captioned cause.

Upon consideration whereof, the appellee's petition for rehearing is denied.

A true copy

Teste

HOWARD K. PHILLIPS
Clerk, U. S. Court of Appeals,
Tenth Circuit

MARY A. SHERMAN
Deputy Clerk